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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 269

VIRGINIA METAL PRODUCTS CORPORATION,
Petitioner,

against

JAMES HAY TAYLOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF

LEO C. FENNELLY,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

VIRGINIA METAL PRODUCTS CORPORATION,
Petitioner,
against
JAMES HAY TAYLOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review a judgment of that Court entered May 16, 1953, affirming a judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, entered December 16, 1952, insofar as said judgment awarded petitioner $1.00 damages on its counterclaims, when undisputed liquidated damages were proven in the amount of $93,357.08.

A petition for re-hearing was filed on June 11, 1953, and denied the same day.

Summary Statement of Matter Involved

District Court Proceedings

The respondent, Taylor, sued petitioner for libel, based on a proof of loss submitted by petitioner to Hartford Accident and Indemnity Company on a fidelity bond, stating petitioner had lost over $90,000.00 through the dishonesty of its former Treasurer, Taylor. There was a cause of action for slander for a similar statement. Petitioner set up the defense of truth and qualified privilege, together with counterclaims, only three of which are now material. These counterclaims are based upon the same facts as the defense of truth.

The first counterclaim was that Taylor conspired with Samuel Lazarus, doing business as S & L Steel Co., to defraud your petitioner by delivering to Lazarus, petitioner's steel valued at $85,142.56, knowing petitioner would not be paid therefor, and under an agreement that Taylor would receive half of the profits from Lazarus; that Taylor received from Lazarus, on account of the steel, $49,400.00, which Taylor appropriated to his own use.

The second counterclaim was that Taylor conspired to defraud petitioner by delivering scrap to one Shaffer and Southside Junk and Salvage Co., knowing that petitioner would not be paid therefor. The balance due for this scrap is $3,187.92.

The third counterclaim was that Taylor cashed two checks of petitioner totalling $5,026.60 and converted the proceeds to his own use.

The jury brought in a verdict for petitioner on Taylor's complaint of libel and slander, and a verdict for petitioner on its counterclaims in the amount of $1.00.

Petitioner moved to set aside the verdict solely as to damages on the counterclaims and for a directed verdict for the liquidated and undisputed damages proven on the

counterclaims, or in the alternative, for a new trial on the issue of damages on the counterclaims, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure.

The District Court denied petitioner's motion by opinion dated December 12, 1952 (R. A1-A11). The basis of the decision was that the District Court was bound by State law on motions for a new trial, under which, in absence of improper influence, a verdict of $1.00 for petitioner on the counterclaims was considered one for Taylor "perversely thus expressed." (R. A11)

Court of Appeals Proceedings

A notice of appeal to the United States Court of Appeals for the Fourth Circuit was filed on January 13, 1953, and the appeal argued April 14, 1953. On May 16, 1953, a per curiam decision of affirmance was rendered.

A petition for re-hearing was filed on June 11, 1953, calling to the Court's attention that the evidence of damage was undisputed, liquidated, proven to a mathematical certainty and conceded in the brief on behalf of Taylor (R. 152-156). The petition was denied the same day without opinion.

Basis of this Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 1254 of Title 28, U. S. C. (C. 646 Sec. 1, 62 Stat. 928, June 25, 1948).

The judgment of the Court of Appeals sought to be reviewed was entered May 16, 1953. The order denying the petition for re-hearing was entered June 11, 1953.

Questions Presented

1. Is it error, as a matter of law, to refuse to set aside a verdict of $1.00 when the sole, undisputed evidence proved liquidated damages of $93,357.08 to a mathematical certainty?

2. Is it an abuse of discretion to refuse to set aside a verdict of $1.00 when the sole, undisputed evidence proved liquidated damages of $93,357.08 to a mathematical certainty?

3. Was it error for the District Court to hold that the verdict of $1.00 for petitioner on its counterclaims was a verdict for Taylor "perversely thus expressed," applying State instead of Federal law on the motion to set aside the verdict? (This question was raised but not passed upon by the Court of Appeals which, however, adopted the rationale of the State law.)

Reasons for Allowance of the Writ

(1) The Decision of the Court of Appeals is Believed to Have Decided Important Questions of Federal Law which Have Never Been Settled but Should be Settled by this Court.

The effect of the decision below is to decide that where the sole, undisputed evidence shows liquidated damages of $93,357.08 and a verdict of $1.00 is returned by a jury, it is not error to refuse to set aside the verdict either as a matter of law or as an abuse of discretion.

This Court, we believe, has never passed on either question.

The second question was left undetermined in *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 485, stating, "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground

that the trial judge abused his discretion, we have no occasion to determine."

Subsequently, however, in *Dimick* v. *Schiedt*, 293 U. S. 474, 486, this Court expressed the view that, "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; * * *". See *Mills* v. *Scott*, 99 U. S. 25, 30.

The refusal to set aside a nominal or inadequate verdict has been held error as a matter of law in *Stetson* v. *Stindt*, 279 F. 209 (3rd, 1922); *Glenwood Irr. Co.* v. *Vallery*, 248 F. 483 (8th, 1918); *Pugh* v. *Bluff City Excursion Co.*, 177 F. 399 (6th, 1910); *Reisberg* v. *Walters*, 111 F. (2d) 595 (6th, 1940).

The refusal to set aside such a verdict has been held an abuse of discretion in *United Press Assns.* v. *National Newspaper Assn.*, 254 F. 284 (8th, 1918).

The Court of Appeals was mistaken in its belief that there was any conflict of evidence as to damage on the counterclaims. This was called to the Court's attention in the petition for re-hearing (R. 151). Its decision, therefore, would seem to be predicated upon other grounds hereafter discussed under (4).

This Court will review the facts as to damage to determine whether, as a matter of law, there was any evidence to support a $1.00 verdict. *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids*, 223 U. S. 655, 668, 669.

(2) The Decision of the Court of Appeals is in Conflict with Other Circuits which Hold that a Verdict for Less than a Liquidated or an Undisputed Amount Must be Set Aside as a Matter of Law.

The effect of the decision of the Court of Appeals is, we believe, in direct conflict with the following cases of other Circuits which hold that where damages are liquidated, un-

disputed, or proven to a mathematical certainty, the failure to set aside a verdict for less than the damage proven is error as a matter of law.

(a) *Stetson* v. *Stindt,* (supra) the verdict was set aside where, in an action on a note, the jury brought in a verdict for about half of the amount of the note.

(b) *Glenwood Irr. Co.* v. *Vallery,* (supra) where the undisputed evidence showed damages of $1,973.89 and the jury brought in a verdict for a lesser amount, the verdict was set aside.

Both the foregoing cases were cited with approval by this Court in *Fairmount Glass Works* v. *Coal Co.,* (supra).

(c) *Pugh* v. *Bluff City Excursion Co.,* (supra) where, in a negligence action, a verdict of $1.00 was set aside on the ground that the damages, although unliquidated, were obviously greater than $1.00.

(d) *Reisberg* v. *Walters,* (supra) where, in a negligence case, a verdict of $1,500.00 was set aside as being less than the plaintiff's actual expenses and specific damages.

(3) The Decision of the Court of Appeals is in Conflict with Other Circuits on the Question of Whether Failure to Set Aside a Nominal Verdict where the Undisputed Evidence Shows Liquidated Damages in a Greater Amount is an Abuse of Discretion.

While we believe that the failure to set aside a nominal verdict where the sole evidence proves liquidated damage in a greater amount is error as a matter of law, and not as a matter of discretion, the following cases have treated the refusal to set aside such a verdict as an abuse of discretion:

(a) *United Press Assns.* v. *National Newspapers Assn.,* (supra);

(b) *Glenwood Irr. Co.* v. *Vallery,* (supra).

The Decision of the Court of Appeals is Believed to be in Conflict with Decisions of this Court and of Other Circuits in its Interpretation and Application of the Federal Law on Motions to Set Aside a Verdict.

The District Court denied the motion to set aside the verdict for petitioner on the counterclaims holding verdict was in fact, one for Taylor "perversely thus essed" (R. A11). The District Court erroneously be- d it was bound by State law in determining the motion et aside the verdict (R. A6). See *Bernstein* v. *Olian*, . Supp. 672, 674 (D. C. N. Y.); *Hartman* v. *White Motor* 12 F. R. D. 328, 336 (D. C. Mich.); III Barron and Holt- Federal Practice and Procedure, page 223.

The Court of Appeals did not pass upon the question its decision adopted the rationale of the State law h permits the Court, where a nominal verdict, as dis- nished from a substantial though inadequate verdict, turned, to guess why a jury found such a verdict and old such verdict one for the opponent "perversely expressed."

The Court of Appeals apparently adopted the State ry, as it did not decide solely on the mistaken view there was a conflict of evidence as to damage on the terclaims, but also because there was a conflict as to lity.

The Federal law on motions to set aside a verdict is, believe, to examine the record solely as to evidence of age and not as to liability, and if the damages are dated and undisputed, a nominal verdict may not stand. *son* v. *Stindt, Glenwood* v. *Vallery, United Press Assns. ational Newspapers Assn.*, (supra).

The Sixth Circuit in *Reisberg* v. *Walters*, (supra) so in- reted the opinion in *Fairmount Glass Works Co.* v. *Coal* (supra) contrary to the apparent interpretation of the rt of Appeals below.

Prayer

For the reasons outlined, developed more fully in the accompanying brief, petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Fourth Circuit to the end that this cause may be reviewed and determined by this Court; that the final order and judgment of the Circuit Court of Appeals may be reversed and that petitioner be granted such other and further relief as this Court may deem proper.

Dated, New York City
August 12, 1953.

LEO C. FENNELLY,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

VIRGINIA METAL PRODUCTS CORPORATION,
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against
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BRIEF IN SUPPORT OF PETITION

Opinions Below

There was no opinion by the Court of Appeals for the Fourth Circuit. The Court's per curiam decision is annexed to the transcript of the record (R. 148-150).

The opinion of the United States District Court for the Eastern District of Virginia has not been officially reported. It is annexed to the transcript of record (R. A1-A11).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 1254 of Title 28, U. S. C.

The judgment of the Court of Appeals sought to be reviewed was entered May 16, 1953. The order denying the petition for re-hearing in the Court of Appeals was entered June 11, 1953.

Statement

A summary statement of the matter involved is set forth in the petition at pages 2 and 3, (supra).

Damages on the First Counterclaim

This counterclaim involved a conspiracy between James Hay Taylor, Treasurer of petitioner, and Samuel Lazarus doing business as S & L Steel Co. to defraud petitioner by delivering to Lazarus petitioner's steel valued at $85,142.56, knowing, or having reason to know, that petitioner would not be paid therefor, and under an agreement whereby Taylor would receive half of the profits from Lazarus.

Taylor admitted authorizing the shipments of steel to Lazarus and that he had fixed the prices for the steel shown on Def's Ex. 4 (R. A81, A37 [214] A38 [219]).

Taylor admitted that the above stated sum was the amount due for the steel (R. A50 [332]).

Moreover Taylor's brief in the Court of Appeals below conceded that the damages on the counterclaims were liquidated, stating, "* * * Where The Claimed Damages, Under Counter-Claimant's Theory In The Case Were Definitely Established At A Fixed Sum * * *" (Petition for re-hearing, R. 155).

Accordingly, on the undisputed evidence and respondent's concession, petitioner is entitled to $85,142.56 on the First Counterclaim alone.

Damages on the Second Counterclaim

The Second Counterclaim involved a conspiracy by Taylor to defraud petitioner by shipping scrap for the account of one Shaffer, for which petitioner never received payment. It was undisputed that Taylor caused to be shipped five freight cars of scrap for the account of Shaffer and nineteen truckloads of scrap to Southside Junk and Salvage Co., Inc.

Shaffer fixed the value of the shipments to him at $6,087.92 (Def's. Exhs. 68-71, R. A52-A56). The truck shipments were valued by one, Cohen, at $1,600.00 (R. A71) [791]) or an aggregate amount of $7,687.92. Shaffer and Southside paid petitioner in a negotiated settlement $4,500.00, leaving a balance due of $3,187.92 due petitioner. There was no other evidence as to damage.

Accordingly, it is undisputed that petitioner is entitled to recover on this Second Counterclaim the liquidated sum of $3,187.92.

Damages on the Third Counterclaim

This counterclaim was for the conversion by Taylor of the proceeds of two checks of petitioner totaling $5,026.60.

Taylor admitted cashing the checks and using the proceeds for his own use (R. A46 [264]).

Taylor's brief in the Court of Appeals conceded that the amount involved was undisputed:

> "As to the third counterclaim, it is undisputed that two checks, totaling $5,026.60, were drawn on defendant, cashed and the proceeds retained by plaintiff. * * *" (Petition for rehearing R. 153)

Here too it is undisputed, therefore, that petitioner is entitled to recover on the Third Counterclaim the sum of $5,026.00.

Specification of Errors

The Circuit Court of Appeals erred:

(1) In refusing to set aside the verdict of $1.00 damages on the counterclaims when the undisputed evidence showed liquidated damages of $93,357.08;

(2) In holding that it was not an abuse of discretion to refuse to set aside a $1.00 verdict on the counterclaims when the undisputed evidence showed liquidated damages in the sum of $93,357.08;

(3) In holding that on the motion to set aside the verdict of $1.00 on the counterclaims, the Court could consider the question of liability instead of solely the evidence as to damage on the counterclaims.

ARGUMENT

1

The Court of Appeals Erred as a Matter of Law in Refusing to Set Aside the $1.00 Verdict on the Counterclaim since the Sole, Undisputed Evidence Showed Liquidated Damages of $93,357.08, Proven to a Mathematical Certainty.

The Court of Appeals was in error in its belief that there was a dispute as to the amount of damage on the counterclaims. This was specifically brought to the attention of the Court below in the petition for re-hearing (R. 152-158).

As demonstrated in the "Statement", the sole, undisputed evidence of damage proved liquidated damages to a mathematical certainty, as conceded by the brief on behalf of Taylor below (Petition for re-hearing R. 153, 155).

The jury having found for petitioner on the issue of liability on the counterclaims, it was the duty of the Court to determine whether a verdict of $1.00 was in accord with the undisputed evidence of damage.

Where the amount of damages is undisputed or proven to a mathematical certainty, a nominal verdict must be set aside as a matter of law, not as a matter of discretion. *Stetson* v. *Stindt,* 279 F. 209 (3rd); *Glenwood Irr. Co.* v. *Vallery,* 248 F. 483 (8th); *United Press Assn.* v. *National Newspaper Assn.,* 254 F. 284 (8th); *Reisberg* v. *Walters,* 111 F. 2d 595 (6th).

The first three of the above cases were cited with approval in *Fairmount Glass Works* v. *Coal Co.,* 287 U. S. 474, 483. It would seem clear that the *Fairmount* case does not hold contrary to the principle of these three cases.

Unlike the *Fairmount* case, in the case at bar, the damages involved were undisputed; the sole evidence proved the amount thereof to a mathematical certainty; there were no offsets and no separate defenses to these counterclaims.

The jury, having found for petitioner on the question of liability, petitioner is entitled to recover the exact amount of damages proven. If Taylor was liable at all as the jury found he was, then he was liable for all of the amount due, not merely for $1.00.

Even in a negligence case, where the damages were unliquidated, a $1.00 verdict was not permitted to stand as a matter of law where the jury found for the plaintiff. *Pugh* v. *Bluff City Excursion Co.,* 177 F. 399, 401 (6th).

> "The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement. Its effect was to cut off the plaintiff from her privilege of having another trial if the jury were unable to agree upon the question of her right to recover. And upon the new trial to which she was entitled, she might

be able to satisfy the jury that she was entitled to recover upon the merits of the action and have substantial damages."

This underlying principle has been applied in most of our courts whether the damages were liquidated[1] or unliquidated[2].

The principle involved in the case at bar is exactly as if the action were on a note for $1,000.00 where the liability but not the amount is contested, and the jury finds for the plaintiff but awards him only $1.00. Such a verdict is obviously unsupported by any evidence as to damage, and should be set aside as a matter of law, as the plaintiff would be entitled to the $1,000.00 or nothing.

For example, on the third counterclaim at bar which involved the conversion by Taylor of $5,026.60 which Taylor admitted taking and never returning. He did, however, deny liability. The jury, having found for petitioner on the issue of liability, it is obvious that Taylor was liable

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[1] *Hill* v. *Cloud*, 173 S. E. 190 (Ga.); *British Empire Ins. Co.* v. *Hasenmayer*, 178 Pac. 180 (Ore.); *Herman* v. *O'Connor*, 227 N. W. 584 (Iowa); *Fargo* v. *Larson*, 207 N. W. 1003 (N. D.); *Preston* v. *Farmers Irr. Dist.*, 279 N. W. 298 (Neb.); *Coleman* v. *Utely*, 240 S. W. 10 (Ark.); *Machlin* v. *McNetton*, 30 Misc. 749 (N. Y.) (63 N. Y. S. 438); *Hatch* v. *Attrill*, 118 N. Y. 383; *Powers* v. *Gouraud*, 19 Misc. 268 (N. Y.) (44 N. Y. S. 249); *Pierce* v. *Schaden*, 62 Cal. 283; *Holcombe* v. *Reynolds*, 75 S. O. 938 (Ala.); *Paschall* v. *Reed*, 51 N. W. 2d 342 (Ill.); *Stierheim* v. *Bechtold*, 43 A. 2d 916 (Pa.).

[2] *Bass Furniture & Carpet Co.* v. *Electric Supplies Co.*, 225 Pac. 519 (Okla.); *San Guiliano* v. *Black & White*, 145 A. 872 (N. J.); *Klotz* v. *Mango*, 141 A. 164 (N. J.); *McKibben* v. *Anthony*, 194 S. E. 446 (S. C.); *Gunderson* v. *Danielson*, 211 N. W. 471 (Minn.); *Daniels* v. *Hansen*, 276 P. 819 (Kan.); *Clark* v. *Spurdis*, 258 S. W. 881 (Tex.); *Smith* v. *Kansas City*, 184 S. W. 82 (Mo.); *Travers* v. *Macon Ry. & Lt.*, 90 S. E. 732 (Ga.); *Martin* v. *Kraemer*, 288 S. W. 903, 904 (Ark.); *Greer* v. *Board of Com. of Knox Co.*, 169 N. E. 709 (Ohio); *Davis* v. *City Mountain View*, 247 S. W. 2d 539 (Mo.); *Riggs* v. *Smith*, 11 P. 2d 358 (Idaho); *Brown* v. *Wyman*, 195 N. W. 52 (Mich.).

for the full amount. He could only be liable for all or nothing.

The result of the decision of the Court of Appeals is contrary to the principle laid down by this Court in *Dimick* v. *Schiedt*, 293 U. S. 475, 486,

> "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; * * *"

There is no more reason for setting aside a verdict in excess of a legal amount than there is for setting aside one which is less than the undisputed damages proven. Compare *Mills* v. *Scott*, 99 U. S. 25, 30; *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80.

As a matter of law, therefore, it was error for the Court of Appeals to refuse to set aside the verdict as to damages on the counterclaims.

2

It was Error to Hold there was No Abuse of Discretion in Failing to Set Aside the $1.00 Verdict on the Counterclaims.

While we believe the failure to set aside the nominal verdict is, on the facts, a matter of law and not of discretion, the Court of Appeals held there was no abuse of discretion. This, of course, upon the erroneous belief that there was a conflict of evidence as to damage on the counterclaims.

Actually, the trial Court never exercised any discretion, nor did it consider the question of whether there was any evidence of damage to support a nominal verdict.

The trial Court, believing itself bound by State law, held that the nominal verdict for petitioner on the counterclaims was one for Taylor "perversely thus expressed".

The trial Court thus erroneously excluded from consideration matters appropriate to a decision on the motion. *Fairmount Glass Works* v. *Coal Co.* (supra at p. 483).

If there be any discretion as to the motion, there was a patent abuse thereof where the damages were undisputed and the sole evidence showed substantial damage to an exact amount. *United Press Assns.* v. *National Newspapers Assn.* (supra). Also cases in footnotes 1 and 2.

The Court of Appeals' attempt to rationalize the verdict in this case is erroneous in several respects; the principal among these is Court's not realizing that the evidence as to damages on the counterclaims was undisputed and proven to a mathematical certainty.

The jury brought in a verdict for petitioner on Taylor's complaint. The defense to Taylor's complaint was based on the same facts as the counterclaims. There were but two defenses, truth and privilege. It is obvious that the jury found for the defense of truth because if it did not, it could not have brought in a verdict for petitioner on the counterclaims. Had it found for the defense of privilege, the only consistent verdict would have been to find against petitioner on the counterclaims.

Thus, the only consistent view of the jury's verdict is that it found twice for petitioner on the issue of Taylor's dishonesty once on the complaint and again on the counterclaims, but failed to assess damage in the amount proven.

There are plausible reasons to explain why the jury brought in a $1.00 verdict on the counterclaims. It was in evidence that Taylor was financially irresponsible so that a judgment was worthless; and it was in evidence that petitioner had pending a suit against Hartford Accident and Indemnity Company on a fidelity bond to recover for these very losses due to Taylor's dishonesty. (Plaintiff's Exhibit 5).

Such speculation is unnecessary as it was the Court's duty once the jury found for petitioners on the question of liability to set aside the $1.00 verdict as the undisputed evidence proved liquidated damages in an exact amount.

3

It was Error to Apply State Law and to hold the Verdict of $1.00 for Petitioner was one for Taylor "Perversely thus Expressed."

This question was raised in the Court of Appeals but not mentioned in its decision, which appears to adopt the reasoning of the State law.

The trial Court erroneously thought itself bound by State law and applied dicta from *Rawley* v. *McIlhenny*, 163 Va. 735, as the test on motions to set aside verdicts for nominal, as distinguished from substantial, damages. That case was a negligence action with unliquidated damages. The trial Court regarded the State law as predicated on *Snyder* v. *Portland Light and Power Company*, 215 Pac. 887 (Ore.). This, too, was a negligence case with unliquidated damages; indeed, the law of Oregon is to the very contrary where damages are liquidated. *British Empire Ins. Co.* v. *Hasenmayer*, 178 Pac. 180 (Ore.).

The Federal law applicable to a motion to set aside a verdict requires the court, we believe, to examine the evidence as to damages alone in order to determine if a $1.00 verdict is supported by any evidence. If the damages are undisputed, or the sole evidence shows liquidated damages, the verdict must be set aside as a matter of law. *Stetson* v. *Stindt, Glenwood Irr. Co.* v. *Vallery, United Press Assns.* v. *National Newspaper Assn., Reisberg* v. *Walters*, (supra).

The Court of Appeals, being unaware that there was no conflict of evidence as to damage, bases its decision upon such a supposed conflict as well as upon the actual conflict as to liability, citing *Fairmount Glass Works* v. *Coal Co.*, (supra).

We have already pointed out the differences between the case at bar and *Fairmount*, which recognizes (page 483), that where damages are undisputed or proven to a certainty, nominal verdicts must be set aside.

If *Fairmount* is supposed to hold that the Court has the power to say a verdict for one party is, in fact, a verdict for the opponent "perversely thus expressed", we respectfully submit it should be reviewed, as contrary to the Seventh Amendment. Such a doctrine permits the Federal Trial Court to substitute its views for the jury's. Compare *Dimick* v. *Schiedt*, (supra).

Such a proposition is also at variance with the settled principle that, on appeals from a jury verdict, it must be assumed that all material issues were determined in favor of the prevailing party, who is entitled to have the evidence considered most favorably to him. *Powers* v. *Gouraud*, 19 Misc. 268; *Maclin* v. *Prettow*, 176 Va. 400, 403; *United States* v. *Hansen*, 70 F. 2d 230 (9th).

Conclusion

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated, New York City
August 12, 1953

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 269

VIRGINIA METAL PRODUCTS CORPORATION,
Petitioner

v.

JAMES HAY TAYLOR,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

VIRGINIA METAL PRODUCTS CORPORATION
Petitioner,

v.

JAMES HAY TAYLOR,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit (not yet reported) is set out in the Record at pps. 148-150.

The opinion of the United States District Court for the Eastern District of Virginia (Richmond Division) (not yet reported) is set out in the Record at pps. 1-11.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner pursuant to Section 1254(1) of Title 28, U.S.C.

REASONS FOR DISALLOWANCE OF WRIT

1. There are no important questions of Federal law raised.
2. The Decision here is not in Conflict with Decisions in other Circuits as to Verdicts where Sole Evidence is undisputed as to Damages.
3. The Decision here is not in Conflict with Decisions in other Circuits as to Application of Federal Law on Motions to Set Aside a Verdict.

STATEMENT OF THE CASE

The Respondent, Plaintiff in the District Court, sued Petitioner for libel and slander, alleging $100,000.00 damages because of a claim filed by Petitioner with a bonding company, which claim asserted that Respondent had dishonestly taken approximately $99,000.00 from Petitioner, and damages from oral statements to the same effect, both claim and statements being made by Petitioner, (R. A-1-2).

Petitioner filed an Answer and Counter-Claim denying the Respondent's allegations, and alleging the sum of $97,030.95 was due from Respondent to Petitioner. (R. A-2).

After a jury trial, a verdict was returned on the Complaint "for the Defendant, Virginia Metal Products Corporation," and on the Counter-Claim "for the Defendant, Virginia Metal Products Corporation, and award judgment in the amount of $1.00". (R. A 2).

After verdict, Respondent moved that verdict on the Complaint be set aside and a new trial granted on the Complaint solely on the question of damages, or, in the alternative, that the verdict on the Complaint be set aside and judgment entered for him on

the Complaint. This motion was overruled by the Trial Court, and, though pressed by Respondent before the Court of Appeals for the Fourth Circuit, it is not now in issue before this Court, since the Trial Court's action was affirmed by the Court of Appeals, and no further action has been taken by Respondent. (R. A-2-3).

Petitioner filed a motion that the verdict on the Counter-Claim be set aside and a directed verdict be entered for it on the Counter-Claim for the sum claimed, or, alternatively, that the Counter-Claim verdict be set aside and a new trial ordered, solely on the question of the amount of damages on the Counter-Claim. The Trial Court also denied Petitioner's motion, and entered judgments in accordance with the verdicts. Petitioner and Respondent both appealed, and the issues presented by the denial of the two motions to set aside the verdicts were argued before the Court of Appeals. (R. A-11).

The Court of Appeals for the Fourth Circuit affirmed the District Court's denial of the motions of both Petitioner and Respondent, and the Petitioner (alone) is now seeking a review by this Court.

ARGUMENT

The major issue throughout this case has been purely factual. It is improper, and a misrepresentation of the record and the evidence for Petitioner to assert that the "evidence as to damages on the counter-claims was undisputed and proven to a mathematical certainty." The question of Taylor's responsibility for any loss suffered by the Company was simply a jury question of fact. The contentions of Petitioner were completely contradicted by Respondent's evidence, and finally disposed of, as an issue of fact, by the jury's verdict awarding only $1.00 damages on the Counter Claim of $97,030.95.

The record is replete with contradictions as to practically every material fact going to make up Petitioner's case before the jury. Even a cursory inspection of the transcript of the evidence reveals the completely conflicting versions of what happened, which were presented to the jury by plaintiff and defendant.

No citations are needed to support the proposition that a decision of conflicting versions of facts by a jury is final and should not be disturbed on review, except in cases of fraud, and for like reasons.

The Circuit Court has answered in the negative the question:

Was The Verdict of The Jury On The Evidence Manifestly Wrong, And Therefore To Be Set Aside As Contrary to The Evidence?

There is no reason or precedent for a second review of the Record for the same purpose by this court. The jury was given the evidence in the fullest possible fashion, in a trial which took approximately seven days, with almost an additional day for arguments of counsel. The jury considered this evidence, argument, and the charge of the Court for some three and one-half hours, and returned the nominal verdict on the Counter-Claim indicated above.

The Trial Court, in passing on motions to set aside the verdict, held.

"It was, and still is, my view that under the evidence the jury could have brought in a verdict for either the plaintiff (Taylor, Respondent here) or Virginia (Virginia Metal Products Corporation, Petitioner here) on this counter-claim and there would have been sufficient evidence to sustain the verdict either way." (Items in parentheses added). (R-A-3-4).

The Court of Appeals, after considering the same point now

brought forward here and hearing the same arguments as are now presented here, held as follows:

"In view of the fact that there was conflict in the testimony as to all the matters necessary to establish liability on the part of plaintiff as well as to the amount of damages, if any, which defendant was entitled to recover of plaintiff, we cannot say there there (sic) was abuse of discretion on the part of the judge in refusing to set aside the verdict which awarded the defendant nominal damages". (R.149-150).

The foregoing quotations from the two judicial decisions demonstrate the inaccuracy (to use a mild word) of the statement of Petitioner's Counsel, that ". . . . . the Sole, Undisputed Evidence Showed Liquidated Damages of $93,357.08, Proven to a Mathematical Certainty." (Petitioner's Brief, p. ii).

Because there is no foundation for Petitioner's basic assertion, the argument of Petitioner's brief cannot stand up. It rests upon nothing. The reasons assigned by Petitioner for the allowance of the writ, as set out in his Brief, become meaningless as soon as it is understood that they are based on Petitioner's misrepresentation that the damages were liquidated and proved to a "mathematical certainty," and on his complete disregard of the failure of proof of liability, discussed later in this brief.

Petitioner's first reason assigned is that "The Decision of the Court of Appeals is Believed to Have Decided Important Questions of Federal Law which Have Never Been Settled but Should be Settled by this Court." (Petitioner's Brief, Index 1). This is later amplified by the following statement:

"The effect of the decision below is to decide that where the sole, undisputed evidence shows liquidated damages of $93,357.08 and a verdict of $1.00 is returned by a jury, it is not error to

refuse to set aside the verdict either as a matter of law or as an abuse of discretion." (Petitioner's Brief, pg. 4).

This shocking criticism of the Circuit Court is based entirely on the premise that the "sole evidence" showed liquidated damages in the indicated amount. Since, in fact, the evidence was highly conflicting as to liability for loss, and as to the amount of loss, it would have been manifest error to set aside the jury's verdict on a review of the merits. There is, therefore, no "undecided, important question of Federal law" actually presented here.

Petitioner's second reason why the Writ should be allowed is that "The Decision of the Court of Appeals is in Conflict with Other Circuits which Hold that a Verdict for Less than a Liquidated or an Undisputed Amount Must be Set Aside as a Matter of Law." (Petitioner's Brief, Index).

The application of this doctrine in the present case is based again on the false premise that Petitioner showed in the Trial Court a liquidated or undisputed amount due from Respondent to Petitioner. When the falsity of this premise is exposed, the statement of the second reason becomes meaningless, and it is apparent that the decision of the Court of Appeals is not in conflict with those of other circuits.

The third reason assigned by Petitioner for the allowance of the Writ is that "The Decision of the Court of Appeals is in Conflict with Other Circuits on the Question of Whether Failure to Set Aside a Nominal Verdict where the Undisputed Evidence Shows Liquidated Damages in a Greater Amount is an Abuse of Discretion." (Petitioner's Brief, Index).

This point again is based on the repeated, false premise that the evidence is undisputed in showing liquidated damages in the amount claimed. If the premise were accepted, then the cases cited might be in point. But, since the premise cannot, in the face of the record, be accepted, the cited cases need no discussion.

The fourth reason assigned by Petitioner for allowing the Writ is that "The Decision of the Court of Appeals is Believed to be in Conflict with Decisions of this Court and of Other Circuits in its Interpretation and Application of the Federal Law on Motions to Set Aside a Verdict." (Petitioner's Brief, Index).

In considering this ground assigned, it is necessary to look to the cases cited and the argument expressed in Petitioner's Brief.

This argument appears to be laid out as Points 2 and 3 in Petitioner's Brief (pps. 15 and 17). The Trial Court is, of course, vested with full discretion to review the case as a whole upon a motion to set aside a verdict. Petitioner attempts first to argue that the verdicts of the jury resolved the issue of liability wholly in Petitioner's favor. That this is not so is amply demonstrated by the fact that the very same verdict which Petitioner contends has settled the issue of liability in his favor has also established the damages in his favor at $1.00. This certainly is a decision that any liability was at least nominal and probably doubtful. It is indeed a novel suggestion that Petitioner may be permitted to cut and tailor portions of a verdict thus, so as to fashion a garment more to his liking. It would seem elementary that Petitioner must take all of the verdict, and is not permitted to pick and choose that portion which suits his needs of the moment.

The Trial Court scrutinized the whole record, in reviewing Petitioner's motion to set aside the verdict, and exercised its judgment to conclude that the verdict should be allowed to stand. This review by the Trial Court comprehended all of the evidence, whether as to liability or as to damage, and was affirmed by the Circuit Court. Why should this Court be asked to review again the factual record?

In this same line of argument in Petitioner's brief, we again come to a reassertion of the false premise formerly discussed,

namely, that the damages were undisputed and that the sole evidence showed substantial damage to an exact amount.

This argument can be answered briefly by a showing that is typical of the various elements supposedly making up this "sole, undisputed" evidence of damage. In Petitioner's Brief, p. 11, the following quotation occurs:

"Taylor's brief in the Court of Appeals conceded that the amount involved was undisputed:

> 'As to the third counterclaim, it is undisputed that two checks, totaling $5026.60, were drawn on defendant, cashed and the proceeds retained by plaintiff — —' (Petition for Rehearing R. 153)".

It is regrettable, but understandable, that Petitioner did not make the effort to complete the quotation set out from Taylor's brief below. Had he done so, it would have revealed a discussion of the two checks, showing ownership of the money by others than Petitioner and concluding in the following words:

"Plaintiff (*Taylor*) states that the money is that of George Reynolds and does not, and did not, belong to defendant (*Petitioner here*). Appendix, pps. 37, 38)" (Matter in parentheses added).

The foregoing is entirely typical of the evidence and disproves fully the contention of Petitioner that the "sole" evidence as to damage was "undisputed", or "liquidated".

Petitioner in his brief in support of the Petition for Writ of Certiorari goes on to say, following the quotations above laid out:

"Here too, it is undisputed, therefore, that petitioner is entitled to recover on the Third Counterclaim the sum of $5,026.00". (Petitioner's Brief, p. 11).

Suffice it to say as to this argument that never before has the word, "therefore", been called upon to bear a more intolerable burden.

Petitioner further states that the decision of the Court of Appeals was erroneous in several respects, the principal error being that that Court did not realize that "the evidence as to damages on the counterclaims was undisputed and proved to a mathematical certainty." (Petitioner's Brief, p. 16).

In the light of the Petitioner's vigorous and repetitive efforts to impress this point, in his arguments before the Trial Court on the motions, in his brief to the Court of Appeals, in his argument before the Court of Appeals, in his Petition for Rehearing directed to that Court, and at every other opportunity, it is impossible to see how the Court of Appeals could possibly have 'failed to realize' the nature and conflict of the evidence as to damages.

The case cited in Petitioner's brief at this point of *United Press Association v. National Newspapers Assns.*, 254 Fed. 284 (C.C.A. 8th, 1918) appears to be good law in its proper context, but, as is indicated in Petitioner's brief, one essential element of its logic is that there must be *undisputed* and *sole* evidence showing substantial damage to an exact amount. A similar comment can be made as to *Stetson v. Stindt*, 279 Fed. 209 (C.C.A. 3rd, 1922); *Glenwood Irr. Co. v. Vallery*, 248 Fed. 483 (C.C.A. 8th, 1918), and *Reisberg v. Walters*, 111 F. (2d) 595 (C.C.A. 6th, 1950). It will be noted that the above cases are all cited in Petitioner's brief for the following proposition:

"*If* the damages are *undisputed*, or the *sole* evidence shows *liquidated* damages, the verdict must be set aside as a matter of law." (Petitioner's Brief, p. 17). (Italics ours.)

Respondent need not quarrel with the statement of law derived from those cases; but he must point out that the principle

of law enunciated is entirely foreign to and inapplicable to *this* case, where there are no "liquidated" or "undisputed" damages.

In summary, this case involves a bitterly contested litigation over *facts;* no novel points of law were presented; no new law was made. Rather, the record is one of the application of old, firmly entrenched principles of trial law to a confused and contested set of facts.

The conflict between Petitioner and Respondent since the verdicts has been essentially an argument over what the facts were. That argument is now made to this Court; neither guile nor artistry can inject any constitutional or other issue justifying the grant of a Writ of Certiorari in this case.

CONCLUSION

For the reasons above set out, Respondent respectfully submits that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

15 September 1953

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IN THE

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OCTOBER TERM, 1953

No. 269

VIRGINIA METAL PRODUCTS CORPORATION,
Petitioner,

against

JAMES HAY TAYLOR,
Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1953

No. 269

VIRGINIA METAL PRODUCTS CORPORATION,
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Respondent.

REPLY BRIEF FOR PETITIONER

The brief on behalf of the respondent states that there was a conflict of evidence as to the amount of damages, but fails to point out a single piece of evidence in support of this assertion. This, for the obvious reason, that there is no such conflicting evidence.

There was, indeed, a conflict of evidence as to liability, which issue the jury resolved twice in favor of the petitioner; once, by the verdict in favor of petitioner on Taylor's complaint, and again, for petitioner on its counterclaims.

The factual situation demonstrating that the quantum of damages on the counterclaims were liquidated, proven to a mathematical certainty and undisputed, is set forth on pages 10 and 11 of petitioner's brief. The respondent has

failed to show any evidence indicating a dispute as to the amount of damages.

The question thus remains, can a jury verdict of $1.00 stand in one circuit and not in others where the amount of damages was liquidated, proven to a mathematical certainty and uncontroverted in the sum of $93,357.08?

Conclusion

For the reasons stated herein and in the petition and brief, it is respectfully submitted that the application for the writ of certiorari should be granted.

Dated, New York, N. Y.
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Respectfully submitted,

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